IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1961

No. 87 ORIGINAL

STATE OF ARIZONA

Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA and COUNTY OF SAN DIEGO, CALIFORNIA.

Defendants

MOTION OF COLTER WATER PROJECT ASSOCIATION, INCORPORATED, FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

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No. 10 ORIGINAL

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I

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Comes now the Colter Water Project Association, Incorporated, a non-profit corporation organized under the laws of the State of Arizona, and respectfully moves this court for leave to file a brief amicus curiae in the above entitled cause.

The articles of incorporation of the Colter Water Project Association provide that it is organized for education regarding and promotion of the Fred T. Colter water applications or filings, made in the office of the State Land and Water

Commissioner of Arizona, beginning September 20, 1923, by which the waters and power of the Colorado River were appropriated for and on behalf of the State of Arizona and water users under the Glen-Bridge-Verde-Highline Project, to divert Colorado River water to Central Arizona and other areas of the state by exchange [1] in accordance with the statutes of the State of Arizona. [2] Members of the association include persons owning land now being farmed by irrigation, or capable of being so farmed, under said project within the State of Arizona. Members also include persons not necessarily landholders but in numerous other walks of life whose "welfare, prosperity, and happiness . . . are dependent on the appropriations in that state". [3]

This association made due request upon parties plaintiff and defendant for consent to the filing of a brief amicus curiae, and the same not being granted by all of the parties, hereby respectfully moves the court for leave to file such brief.

This association, and all others so interested in Arizona, are vitally concerned in this case. It is our desire to be assured that this case receives a full and complete hearing so that the State of Arizona and those claiming under it can begin to build for the future on a sound foundation supported by the decision and opinion of this court. This association prays this motion because we are impelled to be of help in this case. We desire

1. Water applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.
2. Section 5337 of the Revised Statutes of 1913, Civil Code; Section 3281 of the Revised Code of 1928; Section 75-102 of the Arizona Code of 1939.
3. State of Wyoming v. Colorado (1922), 325 U.S. 468.

to point out not only the meaning of the facts in the complaint, but also the significance of facts omitted from it. It is our further desire to help to develop and establish facts as to equity which we believe the court will call for, since without such facts the court could not determine whether the Colorado River Compact provides equitable apportionment of the waters of the Colorado River.

II

FACTS AND ARGUMENT IN SUPPORT OF THE MOTION

1. AN INTERSTATE WATER COMPACT MUST BE EQUITABLE

Equitable apportionment is the rule in litigation concerning water rights on interstate streams.[4] The apportionment may be made either by interstate compact with consent of Congress or by a decree of this court, and is binding upon the citizens of each state and all water claimants.[5] Where the apportionment is made by compact, the court has jurisdiction to determine its validity and effect.[6]

In determining the validity and effect of such a compact, the court has laid down certain standards which must be met. The outstanding case

4. Hinderlider, State Engineer, et al., v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 101-103; Kansas v. Colorado, 206 U.S. 46, 97, Wyoming v. Colorado, 259 U.S. 419, 466; New Jersey v. New York, 283 U.S. 336, 342-43.

5. Hinderlider Case, supra; Poole v. Fleeger, 11 Pet. 185, 209; Garcia v. Lee, 12 Pet. 511, 521; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Coffee v. Groover, 123 U.S. 1, 29, 30, 31; Virginia v. Tennessee, 148 U.S. 503, 525; Wyoming v. Colorado, 286 U.S. 494, 508.

6. Hinderlider, State Engineer, et al., v. La Plata River and Cherry Creek Ditch Co., 304 U.S. 110-111.

decided by this court, and so far as we have been able to discover, the only one in which a ratified interstate water division compact has been brought before the court for review, is Hinderlider, State Engineer et al. v. La Plata River & Cherry Creek Ditch Co. 304 U.S. 92.

In that case, the court allowed the La Plata River Compact between the States of Colorado and New Mexico to stand on the grounds that there was no vitiating infirmity in the proceedings leading up to the compact or in its application; that it afforded efficient, beneficial use of water without abuse of authority; that the compact was not arrived at without due inquiry, nor without honest exercise of judgment; that no claim had been made that it was or is inequitable; and that no water claimant had at any time objected to it. The court held that the evidence conclusively established that the waters of the stream could be used more efficiently under the rotation plan provided in the compact. In the words of the court:

> "As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898, in the Colorado water proceeding did not award to the ditch company any right greater than the equitable share. Hence the apportionment made by the compact can not have taken from the ditch company any vested right **unless there was in the proceedings leading up to the compact or in its application some vitiating infirmity. No such infirmity has been shown. There is no allegation in the pleadings, no evidence in the record, no suggestion in brief or argument,**

> **that the apportionment agreed upon by the commission was not entered into with due inquiry, or that it was not an honest exercise of judgment, or that it was or is inequitable.** . . . There is no suggestion . . . even that any water claimant objected . . . and there is not even a suggestion that either state or the ditch company, has expressed a desire to modify or terminate it." **Hinderlider case, pages 108-109.** (Emphasis supplied).

It is clear then that a ratified interstate water compact to which Congress has consented is binding upon the citizens of the states party to it and upon water claimants **only if found equitable and valid by this court.**

2. FACTS AS TO EQUITY OF THE COLORADO RIVER COMPACT MUST BE BROUGHT TO THE ATTENTION OF THE COURT

In the Hinderlider case, supra, the court has laid down the principle and made the exception. The situation of Arizona meets the exception with respect to the Colorado River Compact. A full presentation of the facts will disclose that compact to be inequitable and invalid by the tests of this court.

The complaint herein, however, does not contain the facts upon which the court can find whether the Colorado River Compact is equitable or inequitable, and whether this compact otherwise meets the required standards set by the court. The complaint merely calls for a decision on the meaning of the compact.

Without a ruling as to its equity, by standards

which the court has emphasized, no final decree can result, since any aggrieved party can nevertheless raise the question of equity in a future suit, even though the states parties to the compact are not parties to such future suit. **Hinderlider case,** pages 110-111.

The purpose of this motion is to urge that these facts be brought to the attention of the court. It is not the intention of this motion to present any such facts exhaustively, nor as pleadings. But it is conceived to be our duty to the court and to the case to present a brief summary of some of the salient facts as to the equity of this compact which do not appear in the complaint. Such facts, and many others, should be brought into this case to aid the court in the determination of this subject.

3. BRIEF SUMMARY OF FACTS SHOWS THAT THE COLORADO RIVER COMPACT IS INEQUITABLE

(1) Vitiating infirmities of the Colorado River Compact and in the proceedings leading up to Arizona's ratification.

In 1944, the Arizona Legislature ratified the compact on the understanding that Arizona would receive between four and five million acre feet from the main Colorado River, **in addition to the waters of the Gila River.**[7] (Also see Appendix).

But in 1953, the complaint (page 30) seeks an interpretation of the compact by which Arizona's title would be quieted and confirmed to only 3,800,000 acre feet annually from the main Colorado

7. Message of the Governor of Arizona to the Special Session of the Arizona Legislature called to ratify the Colorado River Compact. Journal of the Senate, 16th Arizona Legislature, 1st Special Session, page 17.

River and its tributaries, **inclusive of the Gila River.** This is much less than was promised when the compact was ratified.

These facts show that **"there was some vitiating infirmity in the proceedings leading up to the compact or in its application"**, in the words of the **Hinderlider case,** supra. Such proceeding under the compact, which promised more by far at the time of ratification in 1944 than the complaint in this action in 1953 seeks for Arizona, does not meet the required standards of this court. It is self-evident that due inquiry was either lacking or not productive of facts, that judgment was misinformed even though honest, and that the transaction was not equitable to the people of Arizona who would be the real losers if **faith has not been kept with their representatives in the legislature.**

(2) Under the complaint's interpretation of the compact Central Arizona would be deprived of 35% of its cultivated land and of 80% of its agricultural pumping of underground water.

Should the prayer of the complaint be granted, Central Arizona will be compelled to take out of cultivation 343,920 acres, or 35% of its presently cultivated lands, and will be compelled to reduce its agricultural pumping of underground water by 2,760,000 acre feet annually, or by 80%.

The complaint (page 22), seeks supplemental water only from the Colorado River for 725,000 acres in Central Arizona. No irrigation of new lands is alleged. The Central Arizona Project and plan alleged in the complaint,[8] and water ap-

8. House Document No. 136, 81st Congress, 1st Session, Report and Findings, Central Arizona Project, Secretary of the Interior, Table B-23, pages 196-197; Bill of Complaint, page 22.

plications or filings therefor made December 28, 1951[9], disclose that only 639,680 acres would be allowed to remain in cultivation in these areas.[10]

But, during 1952, in the same areas, 984,000 acres of land were irrigated.[11] Thus, if the project is to be activated, 343,920 acres which were irrigated in 1952 must be taken out of cultivation and revert to the desert.

In regard to pumping of underground water, under the Central Arizona Project plan as alleged in the complaint herein, agricultural pumping in the central valleys of the state would be permanently reduced to 718,600 acre feet as the safe annual yield.[12] But during the year 1951, in this same area, 3,478,000 acre feet of water was pumped for agriculture from the underground supply.[13] The project plan further requires an underground water code to be adopted by the Arizona legislature to effect such a reduction.[14] Thus, under the project plan, Central Arizona will be compelled to reduce its agricultural pumping of underground waters by 2,760,000 acre feet, which, in turn, will result in taking presently cultivated lands out of cultivation.

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9. Bill of Complaint, page 24; Water Application No. 3180, Office of Arizona State Land Commissioner.
10. House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 197.
11. Arizona Agriculture, 1953, Bulletin 245, Agriculture Experiment Station, University of Arizona, Tucson.
12. House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 197.
13. Pumping and Ground Water Levels in Arizona in 1951, by L. S. Halpenny and R. L. Cushman, United States Geological Survey. Page 3.
14. Report on Central Arizona Project, United States Department of the Interior, December 1947, page 13.

(3) The Compact actually would deprive Central Arizona of 50% of its Cultivated Land and would give Arizona even less water than it now uses.

Under the interpretation of the compact alleged in the complaint (Page 22), Arizona claims 1,200,000 acre feet for diversion to Central Arizona from the Colorado River. But actually there is no additional water available for Arizona from the Colorado River under the compact and contract thereunder.[15] (Also see Appendix).

Without Colorado River water for this area, the loss to Arizona would be yet greater. The complaint itself states (page 22) that 31% of 725,000 acres now cultivated in the Central Arizona area would go out of cultivation, or 224,750 acres, leaving only 500,250 cultivated acres. Since in 1952, there were 984,000 acres in cultivation, the total reduction or loss would be 483,750 cultivated acres. This represents a loss of almost one-half of the state's irrigated agriculture, its main industry and principal support of its people. In addition, vast potential hydroelectric power and sites located in Arizona would be lost, being nowhere alleged or claimed in the complaint.

The population of Arizona has reached 900,000, doubled since the previous census, and is at the fastest rate of increase in the nation, including that of California. Where there is both priority of right and urgency of need, for Arizona to be deprived of additional water from its only river

15. See statement in Appendix by Governor R. C. Stanford of Arizona (1937); from Bill of Complaint, page 22, Arizona v. California, 283 U.S. 423 (1930); by Professor G. E. P. Smith, (1945); explanation of vote by V. P. Richards, (1944). Many others could be cited to the same effect.

system would be to receive an apportionment which is much less than equity demands.

The Colorado River Compact does not award Arizona an equitable share of the waters of the Colorado River, which this state would receive under the law of prior appropriation and beneficial use common to the seven participating states. Under the compact Arizona's Colorado River water would go in perpetuity to other Colorado River basin states and the Republic of Mexico, which abound in other rivers, and the hydroelectric power would go to distributors outside of Arizona. Such loss of Arizona's developed and potential natural resources would be enormous and unprecedented.

(4) Complaint Fails to Claim Colorado River Water for Arizona Under the Colter Filings which would Rescue All Cultivated Lands in Central Arizona and reclaim much more in this area and throughout the state.

The complaint (pages 22, 24) alleges the dire need of supplemental irrigation water for Central Arizona from the Colorado River, and **pleads the Central Arizona Project** applications or filings made in 1951 to appropriate such water for this purpose. The complaint, however, fails to inform the court that more than 28 years earlier, in 1923, the Colter water applications were made to divert much more Colorado River Water to Central Arizona and other areas of the state by exchange. [16] (Also see Appendix).

The Colter filings and projects thereunder have been kept up with due and reasonable diligence,

16. Water Applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.

in conformity with law, including all necessary engineering, technical, organizational, and other work necessary to develop a project of this magnitude, [17] as is evidenced by a record of eight volumes containing over 8000 pages.

Bills have been introduced in the Arizona legislature, including the current legislature, authorizing the construction of the Glen-Bridge-Verde-Highline Project under the Colter filings either under state authority or in cooperation with the federal government. [18]

Under the Central Arizona Project filings, the complaint claims 1,200,000 acre feet of supplemental water from the main stream of the Colorado River for 639,680 acres now irrigated in Central Arizona and no more would be allowed. [19]

But under the Colter filings more than 12,000,000 acre feet of water would be diverted from the main stream of the Colorado River through the all-gravity Glen-Bridge-Verde-Highline Project to irrigate 6,000,000 new acres, generate 5,000,000 electrical horsepower, and furnish supplemental water to all lands now cultivated in Central Arizona. Power revenues will more than pay for the construction of the project and for maximum irrigation and multiple purpose uses of the water throughout the state. [20] This project has been sup-

17. Due Diligence in Protection and Development of Arizona Water Resources, (Colter filings), 8 vols., Office of Arizona State Land Commissioner.
18. House Bill 21, Arizona House of Representatives, 21st Arizona Legislature, 1st Regular Session, 1953; House Bill 56, 20th Arizona Legislature, 2nd Regular Session, 1952; House Bill 83, 18th Arizona Legislature, Regular Session, 1947. Many others could be cited.
19. Bill of Complaint, page 22; House Document No. 136, 81st Congress, 1st Session, Report and Findings Central Arizona Project, Secretary of the Interior, Table B-23, page 196.
20. Water Applications No. R-133, A-413, R-132, and amended applications thereafter, Office of Arizona State Land Commissioner.

ported by those who consider that hydroelectric power as in the past should continue to help shoulder the financial burden of making reclamation possible in the west and is opposed by those whose views are to the contrary. The project under the Colter filings affords maximum beneficial use of Colorado River water not only for Arizona but also for the entire river system. It accords with all provisions and preferences of state and Federal law, as to beneficial use of water, and with all accepted engineering and conservational principles and practices.

4. A GENERAL ADJUDICATION SUIT IS THE METHOD TO ACHIEVE EQUITABLE APPORTIONMENT

The foregoing brief summary of some significant facts which do not appear in the complaint points to the conclusion that a more complete presentation would establish the fact that the Colorado River Compact is not equitable and does not meet the standards laid down by this court. For many years the people and water claimants of Arizona have objected to and continue to object to the terms of the compact on these grounds.[21] Since its ratification in 1944, its modification or repeal has been sought in the state legislature.[22]

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21. Petition of Fred T. Colter, et. al., to intervene, Arizona v. California (1936) 298 U.S. 558; motion of Sidney Kartus, et al. for leave to file petition to intervene in present case. Many other objections could be cited from 1922 to the present.

22. H.R.C. 11, introduced in the 17th Arizona Legislature, Regular Session (1945); H.R. 4, 18th Arizona Legislature, Regular Session (1947); H.B. 248, 19th Arizona Legislature, Regular Session, (1949); H.B. 165 in 1st Regular Session, 20th Arizona Legislature (1951); H.B. 185, in 1st Regular Session, 21st Arizona Legislature (1953). Many other measures introduced in the Arizona Legislature to repeal, modify, and protest the Colorado River Compact could be cited.

Were it not for the exceptions laid down by the court with respect to the validity of inter-state compacts, the people of Arizona would be without recourse or remedy against the inequities of the Colorado River Compact. The constitutional property rights of the citizens of each respective state are protected under provisions of the Federal constitution which make necessary that Congress give its consent to compacts between the states, and through review of such compacts by the court. There appears to be no difference between a compact and other legislation. The court cannot and rightfully has not relieved itself of the responsibility of deciding what is fair and reasonable, and what does not violate constitutional guarantees. The fact of obtaining Congressional approval does not alter this principle. Every decision by this court as to equitable apportionment of interstate waters leaves the door open to future review. There is no final conclusion and probably never will be with things of changing aspect. This is a fundamental truth which compacts with congressional consent cannot supersede. It seems obvious that interstate compacts cannot rise higher than the power which reviews them.

Upon the facts, the court can determine whether the Colorado River Compact is equitable. Your movant is earnestly of the belief, however, that the compact method, particularly as to interstate water division controversies in the reclamation states, is not preferable, and that its use in this manner was never contemplated by the framers of the constitution. If states can enter into compacts as an attribute of sovereignty, the converse must be true that they can withdraw from them

at will. This would make futile any court decree such as that sought in this case. In its most recent decision on this question, the court did not see fit to encourage the compact method. [23] The court decided the matter by litigation, and in its decree retained jurisdiction of the case for the purpose of modifying the decree at any time as might be deemed necessary. [24]

Your movant sincerely submits that the Colorado River controversy should likewise be decided by this court in a general adjudication suit quieting title to the water rights of all states and parties concerned, and not by an interpretation of the Colorado River Compact. By such a general adjudication suit Arizona would gain lasting and immeasurable benefits while injuring no other legitimate interests.

The passage of time over thirty years has proven that the young minority state of Arizona can expect to enjoy its just rights in the Colorado River only through equity and law. It is not interpretation of the Colorado River Compact but its dissolution by legislative repeal or by decree of this court and the quieting of titles in a general adjudication suit that will most equitably serve Arizona and all other states and parties concerned. Your movant earnestly submits this motion in the interest of equity and the most beneficial use of the Colorado River for the people of Arizona and all others concerned in the use of waters and power of this stream.

23. Nebraska v. Wyoming (1945), 325 U.S. 589, 657, 658.
24. Nebraska v. Wyoming (1945), 325 U.S. 625.

III
CONCLUSION

The State of Arizona has the right to speak as parens patriae. But the legal fiction of parens patriae shall not be used in this case to impose an inequitable compact on Arizona, nor to deprive the people of Arizona of their full legal and equitable rights in this case, where the record shows:

(1) that the complaint does not contain the facts upon which the court can determine whether the compact is or is not equitable;

(2) that the complaint asks for an interpretation of the compact, regardless of whether it is equitable or not;

(3) that the nature of the case is such that it is imperative that such facts be brought to the attention of the court for a determination as to the equity of the compact.

This is the very type of a case, then, in which the principle of a brief amicus curiae must be invoked.

WHEREFORE, the movant respectfully prays this Court for leave to file a brief amicus curiae.

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APPENDIX

Page 6, Note 7

From the message of Governor Sidney P. Osborn to the First Special Session of the Sixteenth Arizona Legislature, 1944, called for the purpose of ratifying the Colorado River Compact and contract subject thereto:

"The Gila River is ours—let's leave that out of consideration because we are using that water and it is ours and any Court in this world will so declare it. With the 2,800,000 acre feet out of the main stream and then one-half of the surplus—and we don't know yet what will be and no one can yet tell—I am confident that we will eventually get from the main stream of the Colorado River not less than four million acre feet a year, and probably as much as five million acre feet of water on Arizona lands . . .

. . . Our underground water supply is in danger of becoming depleted . . . But when we start pouring four million acre feet or more water into this underground reservoir every year, I am sure you will agree with me that today Arizona is on the threshold of the most marvelous development in its history, a development unexcelled in any state in the nation in the past . . .

. . . Of course, to effecctuate this contract it is necessary for the legislature to ratify the contract and ratify the compact, and I am in hopes that you will do that as speedily as possible . . ." Journal of the Senate, First Special Session, Sixteenth Arizona Legislature, 1944, Page 17.

Page 6, Note 7

From explanation of vote by Arizona State Senator Lloyd E. Canfil, on Senate Bill No. 2, for ratification of contract for waters from the Colorado River, subject to the Colorado River Compact:

"I intend to rely on Attorney Carson's assurance to the Senate that this is the best contract obtainable, that he made no concessions to California in this contract, and that the waters of the Gila River system are entirely exempted from the provisions of this contract and belong in toto to Arizona never to be counted against the allotment of 2,800,000 acre feet given our state by this contract, nor can they be counted against the surplus alloted.

"I am sure that this is the intent of the majority of the Senate in voting for this contract, and I hope that no future litigation will lend opportunity to any biased tri-

bunal to interpret this contract otherwise." . . . Ibid, Page 38.

Page 9, Note 15

From statement (Page 3) by Governor R. C. Stanford at Boulder Dam Power Conference before Secretary of the Interior, Washington, D. C. April 16, 1937; "Thus the (Colorado River) compact would allocate Arizona 700,000 acre feet less than it now uses . . ."

Page 9, Note 15

From Bill of Complaint, Page 22, Arizona v. California, 283 U. S. 423 (1930): "Said proposed apportionment of 2,800,000 acre feet of water is less than the quantity of water already appropriated in Arizona, and would provide no water for future appropriation in said state."

Page 9, Note 15

From speech by G. E. P. Smith, Professor of Agricultural Engineering, University of Arizona:

"Allotments of Colorado River water already made to other states and Mexico LEAVE NOTHING FOR FUTURE AUTHORIZATION IN ARIZONA, and the much-discussed plans for a great irrigation project, in the central part of the state cannot be made in fact, without a revision of the Colorado River Compact . . . There is no future allocation for Arizona. It is impossible to see it in that picture. It was 'cruel' to have Bureau of Reclamation officials last summer, travelling about the state, 'promising a 2,000,000 acre feet project for Central Arizona,' with part of the water for Florence and Casa Grande, releasing some Gila water for Safford. The only way, in which we can get future authorization, is through revision of the Colorado River Compact." Arizona Builder & Contractor, May, 1945; From Arizona Daily Star, Tucson, Arizona, May 23, 1945.

Page 9, Note 15

From explanation of vote by Arizona State Senator V. P. Richards, on Senate Bill No. 2, for ratification of contract for waters from the Colorado River, subject to the Colorado River Compact:

"I am compelled to vote "No" because I am convinced that the ratification of this proposed contract will not provide one additional gallon of water to anyone in Arizona." Journal of the Senate, First Special Session, Sixteenth Arizona Legislature, Page 48. (1944).

Page 10, Note 16

This project was initiated in 1916, and in 1923, Fred T. Colter, then a State Senator, who was one of the founding fathers of the State of Arizona, and a member of its Constitutional Convention in 1912, made these filings. Colter did this on the authority of the then Governor of the State of Arizona, George W. P. Hunt, who himself had been President of the Constitutional Convention in 1912, and the first governor of the State of Arizona, and governor for seven terms. The State of Arizona has expended large sums of money for engineering and other work toward these filings. Colter continued as Trustee for these filings until his death in 1944, and Sidney Kartus is today successor to said Fred T. Colter as such Trustee.